United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

ORIGINAL

74-1607

United States Court of Appeals

FOR THE SECOND CIRCUIT

MIKE O'HARA,

Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,

Defendant-Appellee.

On Appeal From the United States District Court For The Southern District of New York

BRIEF AND APPENDIX FOR DEFENDANT-APPELLEE

HYDE, DICKERSON & REILLY
Attorneys for Defendant-Appellee
61 Broadway
New York, N. Y. 10006
(212) 943-7090

JOHN H. REILLY, JR.
CHARLES M. TOMASELLI
Of Counsel

TABLE OF CONTENTS

PAGE

Cases Cited

Statute Cited

Other Authority Cited

United States Court of Appeals

FOR THE SECOND CIRCUIT

MIKE O'HARA,

Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,

Defendant-Appellee.

On Appeal From the United States District Court For The Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE

Statement of the Case

In this seaman's action to recover damages for personal injuries the trial judge, the Honorable Robert J. Ward, U.S.D.J., had the jury answer special interrogatories, as suggested by this Court in *Rivera* v. *Farrell Lines, Inc.*, 474 F.2d 255 (1973) cert. denied 414 U.S. 822. The jury found that the plaintiff established its claim that Moore-McCormack was negligent and that its negligence was a proximate cause of plaintiff's accident. The jury also found that the plaintiff had not established his

claim that the ship, the SS BRASIL, was in an unseaworthy condition and that this unseaworthiness was a proximate cause of his accident. The plaintiff's total damages were found to be $8,140.00. The jury found that Moore-McCormack established its claim that plaintiff was himself negligent and that his negligence was a proximate cause of the accident to the extent of 75%. The plaintiff's net recovery was $2,035.00. Judgment was entered in that amount on January 11, 1974.

Statement of Relevant Facts

O'Hara testified that the accident occurred on May 21, 1969 when he was standing on a moving escalator carrying a rack of glasses, the escalator was jerking, he lost his balance and fell (26a)[1]. A photograph of the escalator was received in evidence (Def.Ex.J1; 12aa).[2]

On cross-examination O'Hara testified that when he referred to jerking he meant an abrupt starting and stopping of the escalator (1aa). While he was on the escalator it stopped for a period of less than five seconds and then started. He was unable to state whether the escalator started at the same rate of speed. He fell after the escalator started the first time after it stopped (2aa). O'Hara also testified that he had a firm grip on the escalator rail when the escalator stopped (2aa).

In his opening statement the plaintiff's counsel told the jury that while riding the escalator the plaintiff rested part of the rack of glasses on his right knee and held on to the bannister with his left hand (11aa).

---

[1] All numerical references followed by the suffix "a" refer to the Appellant's Appendix.

[2] All numerical references followed by the suffix "aa" refer to the Appellee's Appendix.

O'Hara first had trouble with his back in 1963 when he had an accident aboard a United States Lines ship (5aa). He reinjured his back in June, 1968 while working at the Gotham Hotel in New York City (5aa). O'Hara was told by his physicians in the summer of 1968 that it was believed that he had a herniated disc of the back and they wanted him to enter the hospital for a myelogram (5aa).

The defendant's orthopedist, Howard Balensweig, M.D., who examined the plaintiff on December 5, 1972, was of the opinion that the plaintiff suffered from degenerative disc disease which started before August, 1963 and that the accident described by the plaintiff precipitated an attack of disc degenerative disease which terminated sufficiently for the plaintiff to attempt to return to work six to nine months after May, 1969 (6-7aa). Dr. Balensweig also testified that when he examined O'Hara, as far as the back was concerned, he was fit for duty (7aa). The neurology clinic of the Public Health Service in Staten Island, New York found O'Hara fit for duty on September 18, 1969 (Plaintiff's exhibit 1).

The plaintiff walked with a limp and carried a cane to Court during his trial. He testified that he lived at 328 West 46th Street, New York City in the summer and fall of 1971 and claimed that when it was necessary for him to go out in October and November of 1971 he got around with difficulty. He testified that when he went to the National Maritime Building at 17th Street and Seventh Avenue he took a train. He denied walking on occasion from his home to the National Maritime Union in October and November, 1971 (3-4aa). The plaintiff was observed by an investigator, Robert Esposito, on October 22, 1971 and November 5th and 24th, 1971. On each of these days he walked in a normal manner with no apparent physical difficulty (8-10aa). On November 24th, O'Hara walked

from his home to the National Maritime Union and back at a fast pace (10aa).

The plaintiff's income, including wages, salary and tips, for each of the three years prior to his accident was as follows:

1966	$2,878.00
1967	3,297.00
1968	2,683.00 (3aa).

POINT I

The issue of contributory negligence was properly submitted to the jury.

The plaintiff at no time moved to dismiss the defense of contributory negligence. The plaintiff took no exception to the Court's charge of contributory negligence. It was not until after the jury returned its verdict when the plaintiff's attorney moved to set aside the verdict "as against the weight of evidence and upon the ground of gross inadequacy" that any argument was offered against the defense of contributory negligence.

The standard for determining whether a defendant shipowner has presented sufficient evidence to raise a jury question as to plaintiff seaman's contributory negligence is whether, viewing the evidence in the record in the light most favorable to the shipowner, there is complete absence of probative facts to support the conclusion reached by the jury. *Fleming* v. *American Export Isbrandsten Lines, Inc.*, 451 F.2d 1329, 1331 (2 Cir., 1971).

The record offers two reasons for the jury to have concluded that the plaintiff was contributorily negligent:

1. The jury might have inferred that O'Hara was not holding on to the handrail at the time of the accident, and

2. The record supports a conclusion by the jury that O'Hara was not standing on the escalator properly.

O'Hara's failure to hold on to the handrail.

The Sixth Circuit Court of Appeals in *Domany* v. *Otis Elevator Company,* 369 F.2d 604 (1966) was presented with a similar escalator accident involving a shopper who was injured in a department store when an escalator stopped abruptly. The Trial Judge charged the jury that "There being no proof that Mary Domany did anything improper while on the escalator, she is not guilty herself of any negligence * * *." The jury returned a verdict for the plaintiff. Defendants appealed arguing the District Court erred in not submitting the issue of contributory negligence to the jury. The Court of Appeals agreed error had been committed and reversed. The Court of Appeals reasoned on page 608:

> "While the plaintiff, Mary Domany, testified that she was holding on to the handrail at the time of the accident, the jury might well infer that she was not. As the trial judge said in his charge, 'You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve any witness wholly, or in part'. Such an inference would be an immediate inference from the facts proven and would not be predicating one inference on another inference."

The jury also had for its consideration the testimony of the plaintiff's witness Guyon who testified that he saw O'Hara "fall with a rack of glasses that he was holding in his *hands*" (14a).

O'Hara was not standing on the escalator properly.

In his opening statement plaintiff's counsel told the jury:

> He [plaintiff] had at that time a rack of glasses which he was taking up to the main dining room. This was around noon time. He went on to the escalator, and, as was his practice, he rested part of this rack of glasses on his right knee and held on to the bannister with his left hand. (11aa).

If the jury were to accept the statement of plaintiff's counsel, it meant that the plaintiff was either standing on one leg, his left, or that the plaintiff was resting his right leg on the step above the step upon which he had his left leg. The manner in which the plaintiff was riding the escalator was susceptible to the jurors' common sense evaluation as to its propriety, and the jury could reasonably conclude the plaintiff had negligently assumed an unbalanced stance. See *Sykes* v. *Stix, Baer & Fuller Co.*, 238 SW 2d 918, in which the St. Louis Court of Appeals of Missouri held where there was evidence plaintiff had stood with her feet on different escalator steps, that no error was committed in instructing the jury that the verdict should be for the defendant, if the jury found plaintiff undertook to ride with her feet on different steps and failed to use either of the handrails.

POINT II

The jury's verdict upon special interrogatories was consistent, and a new trial should not be ordered.

The jury returned a special verdict upon written interrogatories in favor of the plaintiff on the negligence action, and in favor of the defendant on the unseaworthiness action. The argument raised in Point II of Appellant's brief is that these findings are inconsistent and warrant a new trial.

Assuming that it was inconsistent for the jury to find that the plaintiff did not establish his claim of unseaworthiness but did establish his claim of negligence, the inconsistency does not warrant a new trial in that the plaintiff was not adversely affected. 6A Moore's Federal Practice §59.08(4) p. 59-141. But notwithstanding, *Turner* v. *"The Cabins", Tanker, Inc.*, 327 F.Supp. 515 (D.C. Del. 1971), the differing standards of causation charged by the Court in the Jones Act claim and the unseaworthiness claim, offer an explanation for the jury's determination.

The trial court charged the jury on causation in the following language:

> "We next consider the matter referred to in the law as causation.
>
> Not every injury that follows an accident necessarily results from it. If I am in an automobile accident today and get a cold tomorrow, that does not mean my cold is a result of the automobile accident. In this respect, a different rule applies to proof of causation under the Jones Act than the rule applicable to a claim of unseaworthiness.
>
> Under the Jones Act, an injury or damage is considered caused by an act or failure to act whenever

> it appears from a preponderance of the evidence that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. However, with respect to the unseaworthiness claim, it is necessary for the plaintiff to show not only that the act or omission played a substantial part in bringing about or actually causing the injury to him but also that the injury was either a direct result or a reasonably probable consequence of the act or omission." (53-54a)

The jury's determination that the vessel was seaworthy can be grounded on the plaintiff's failure to establish that the shipowner's act or omission played *a substantial part* in causing the injury.

Judge Gurfein considered a motion to set aside a verdict in favor of a plaintiff seaman on the ground that it was inconsistent for the jury to have found negligence but no unseaworthiness in *Ayala* v. *Moore-McCormack Lines, Inc.*, 55 F.R.D. 263 (S.D.N.Y. 1972). The issue of fact presented by Ayala was whether there was wet paint rendering slippery a life boat on the defendant's vessel, into which Ayala had been ordered to climb and whether this condition was a cause of the injury. In its motion to set aside the jury verdict the defendant argued that since the presence of fresh paint was the vital link in support of both unseaworthiness and negligence, the jury could not logically have found that there was no wet paint in considering the unseaworthiness claim and yet have found that there was wet paint in considering the negligence claim.

Judge Gurfein denied defendant's motion and reconciled the alleged inconsistency by pointing out the difference in his charge on causation in the Jones Act claim from that given on the unseaworthiness claim.

The portion of the trial court's charge quoted above is almost identical to the language of Judge Gurfein in *Ayala* v. *Moore-McCormack Lines, Inc., supra,* at 265.

Plaintiff also charges the jury was confused and misunderstood the law and the facts. No support for this position is found in the record. The court clerk questioned the jurors after they returned with their verdict and confirmed the jurors' answers to the special interrogatories (Transcript pp. 532-534). The members of the jury were polled. Before excusing the jury the trial judge commended them for being "exceedingly attentive" and "most conscientious", and observed that they took their duties most seriously, having deliberated for some three hours on January 8 and in excess of that time on January 9, 1974 (Transcript pp. 534-535).

In denying plaintiff's post trial motion to set aside the verdict, the trial judge stated:

> "The Court concludes that there is sufficient evidence in the record to support the jury's verdict. In addition, the Court observes that the jury did appear to understand the case. They dealt first with questions of liability, returning shortly after they had begun their deliberations yesterday afternoon, to hear the testimony of the two eye witnesses, Mr. Guyon and Mr. Scott. Thereafter, they moved to the matter of damages, and I would note that they called for and were given items in evidence, including the hospital records, which they had yesterday afternoon, and the ship's medical log, which they had this morning.
>
> I would suggest that there is sufficient in the record to support the verdict of this jury.
>
> The Court therefore denies the motion to set aside the verdict." (Transcript pp. 540-541).

The sole authority offered by the plaintiff for its argument that there should be a new trial is *Caskey* v. *Village of Wayland,* 375 F.2d 1004 (2 Cir. 1967). A new trial was ordered in *Caskey* because this Court decided that the trial court's instructions on damages had the effect of influencing the jury unfairly to bring in a small verdict. The *Caskey* decision has no bearing on this appeal.

CONCLUSION

The Judgment of the District Court should be affirmed.

Respectfully submitted,

HYDE, DICKERSON & REILLY
Attorneys for Defendant-Appellee
61 Broadway
New York, N. Y. 10006
(212) 943-7000

JOHN REILLY, JR.
CHARLES M. TOMASELLI
Of Counsel

APPELLEE'S APPENDIX

Excerpts from Testimony of Mike O'Hara

• • •

(147) *Cross-examination by Mr. Reilly*:

(147)

Q. You referred to the elevator jerking when the accident occurred. A. Yes, sir. The escalator.

Q. Yes. The escalator. Could you tell the jury, the Court and me what you mean by that? A. Yes, sir. By starting and stopping abruptly.

• • •

Q. I take it that you were riding on this escalator without any trouble for some period of time; is that right?

Mr. Schwartz: I object to the form of the question, your Honor.

The Court: It's cross-examination.

(To the witness): Had you been using that escalator for some period of time without it jerking?

The Witness: Yes, sir. Sometimes, yes, your Honor.

Q. And on the day of your accident, you stepped aboard the escalator, and I take it that you proceed to go up for some distance without any difficulty; is that right? (148) A. Yes, sir.

Q. And then when you were on the escalator— A. The trouble started, sir.

Q. And the trouble started by the escalator stopping; is that right? A. Yes, sir.

Excerpts from Testimony of Mike O'Hara

Q. And how long did it remain stopped? A. I have no idea, sir. I started to—you know, stopped and start again, stopped and start again. That's all I can say.

Mr. Schwartz: May the record show that the witness is moving his right hand quickly back and forth?

The Court: Yes. He did do that.

• • •

Q. Did you fall the moment the escalator stopped? A. Not right away, but I had a firm grip on the rail, so—not right away.

Q. How long was the escalator stopped for the first (149) time before it started again? A. That I couldn't tell you, sir.

Q. Well, was it two or more seconds? A. Maybe.

Q. Was it as many as five seconds? A. I don't think so.

Q. What? A. I don't think so, sir.

Q. Well, then, after this period of seconds that the escalator was stopped, is it your testimony that it started by itself? A. Yes, sir.

Q. And did it start at the same rate that it was going up when you first boarded it? A. It's hard to say, sir.

Q. How long did the escalator continue to go up after it stopped for the first time? A. I don't know, because I was ejected from it, and I lost consciousness, so I can't tell you. I can't tell you. I didn't look at my watch. I'm sorry.

Q. Well, was it after the escalator started the first time that you fell? A. Yes, sir.

• • •

Excerpts from Testimony of Mike O'Hara

(295)

Q. Defendant's Exhibit C-1 for identification, Mr. O'Hara, line 5, wages, salary, tips, et cetera, $2,878.

Does that refresh your recollection as to what your wages, salaries and tips were in 1966? A. Well, I read it right there.

Q. That is correct, isn't it, Mr. O'Hara? A. Yes, sir.

Q. Referring to Defendant's C-2 for identification, your tax return for 1967, which states Wages, salaries, tips, et cetera, $3,297.

Does that refresh your recollection as to what your wages, salaries and tips were in 1967? A. Correct, sir.

(296)

Q. And is that figure correct? A. Yes, sir.

Q. And referring to Defendant's Exhibit C-3 for identification, your tax return for the year 1968, item 5, wages, salaries, tips, et cetera, $2,683.

Does that refresh your recollection as to what those items were in 1968? A. Correct, sir.

Q. And that is correct? A. Yes, sir.

* * *

(298)

Q. Did you from time to time during 1971 take long walks? A. I wouldn't say so.

Q. Where did you live in the summer of 1971? A. In New York.

Q. Where in New York? A. The place where I lived?

Q. Well, where is that, Mr. O'Hara? A. 328 West 47th Street.

* * *

(299)

Will you tell us what you did during the course of that summer?

Excerpts from Testimony of Mike O'Hara

The Witness: Stayed home most of the time.

Q. Did you go out at all? A. Sometimes, yes.

Q. And how about the months of October and November of 1971; did you go out at all then? A. Sometimes, yes.

Q. And did you go on long walks then? A. I don't think so.

Q. Well, when it was necessary for you to go out in October and November of 1971, how did you get around? A. With difficulty.

Q. Pardon me? A. With difficulty.

Q. Were you limping then? A. Yes, sir.

Q. Could you climb stairs then? A. Oh, yes, but it was hurting me.

* * *

(300)

Q. Did you from time to time in October and November of 1971 go to the National Maritime Building? A. Maybe a few times, yes, sir.

Q. Where is the National Maritime Building?

The Court: Where was it in October and November of 1971?

The Witness: 17th Street, on the west side.

The Court: Just off 7th Avenue?

The Witness: Yes, sir.

Q. And when you went to the National Maritime Building in October and November of 1971, how did you go there? A. I took a train.

Q. Did you walk on occasion in November and October of 1971 from your house to the National Maritime Union on 17th Street? A. No, sir.

* * *

Excerpts from Testimony of Mike O'Hara

(305)

Q. Now, you have had problems with your back, Mr. O'Hara, for years, haven't you? A. Yes, sir.

Q. And when for the first time did you have difficulties with your back? A. I don't recall exactly.

Q. Well, you had an accident aboard a United States Lines ship in 1963, do you remember that? A. Yes, sir.

Q. Is that the first time that you had trouble with your back? A. Yes, sir.

* * *

(311)

Q. And in 1968, you did have another accident, is that right? A. Yes, sir.

Q. And where were you working when you had that accident?

(312)

A. At the Gotham Hotel.

Q. And when did you have that accident? A. It took place in June 1968.

Q. And you told us last week that you were disabled for some period of time after the accident, right? A. Yes, sir.

* * *

(323)

Q. You were referred to Dr. Lalonda by Dr. Fortin, is is that correct? A. Yes.

Q. And you saw Dr. Lolonda in the Polyclinic Hospital in Canada, correct? A. Yes, sir.

Q. And did Dr. Lalonda tell you, when you saw him, in the summer of 1968, that he believed that you then had a herniated disc of the back? A. Yes, sir.

Q. And did that doctor then want you to enter the hospital in Canada for a myelogram? A. Yes, sir.

* * *

Excerpt from Testimony of Dr. Balensweig

Dr. Balensweig—Direct

(444)

Q. In connection with your examination, Doctor, do I understand that you took a history, or your father took a history of an accident in May of 1969? A. Yes, sir.

Q. And did you, sir, form an opinion at the conclusion of your examination with regard to a causal relationship between difficulties which Mr. O'Hara might have been experiencing with his back and such an accident? A. I did form an impression as to causal relationship; yes, sir.

Q. And would you tell the Court and jury what your (445) impression was? A. Yes. My impression was that the accident described by the patient to my father would be consistent with precipitating an attack of disc degenerative disease at that time, which I felt, based on the records I reviewed, had terminated sufficiently for him to attempt return to work within a period of about six to nine months, based upon the Marine Hospital records, primarily, and that he then fell in May of '70, missed a step, complained of left groin pain, developed back pain again and that when I put all of his records together, he has a typical pattern of disc degenerative disease disease starting actually before August '63, symptomatic starting August of '63. He was disabled for thirteen months between August '63 and September '64, and then he had a questionable period of time loss, complaining of back pain, and the next interval of total disability was February to April '67.

Then he went along for thirteen months fit for duty, and then he was working ashore at the Gotham Hotel, fell, June '68, and was disabled over four months at that time, and then there was a stretch of somewhere between five and seven months.

Excerpt from Testimony of Dr. Balensweig

I don't know when he started working again after he left Mount Sinai Hospital, where he worked, and then he was disabled and hasn't worked since this accident, in May of '69.

(446) So that the pattern is a period of disability, a period of work, a period of disability, working, and the periods of working get shorter and shorter, the periods of disability longer, and that's the typical pattern for disc degenerative disease.

I feel that his present disability is partly related to his missing a step and twisting in May of 1970, partly related to and primarily related to the progressive disc degeneration in his back, that the accident in May precipitated a period of increased symptoms and disability, and I feel that it primarily terminated itself.

As far as the back was concerned, he was fit, and then he had these continued headache complaints, and therefore he was kept not fit for duty more on that basis.

* * *

Excerpts from Testimony of Mr. Esposito

Mr. Esposito—Direct

(454)

Q. Did there come a time when you next saw Mr. O'Hara, and, if so, what date? A. Yes. The next date was October 22, 1971.

* * *

Q. Where did you observe him? A. Coming out of his house.

Q. And did you continue to observe him as he left the house? A. Yes; I did.

Q. Where did he go? A. He went to the National Maritime Union Building at (445) 346 West 17th Street.

Q. And how did he go there? A. By train.

Q. Did you observe him as he walked along that day? A. Yes; I did.

Q. And as he climbed the stairs of the subway? A. Yes; I did.

Q. And will you tell us—would you describe his walk for us that day? A. He walked in a normal manner, with no apparent physical difficulty.

Q. When did you last see him on that day? A. At ten-thirty a.m.

Q. Where was he then? A. In the building of the National Maritime Union.

Q. When did you next go to Mr. O'Hara's residency? A. On October 27, 1971.

Q. Was he seen on that day? A. No; he was not.

Q. When did you next go to Mr. O'Hara's residence? A. On November 5, 1971.

Q. Was he seen on that day? A. Yes; he was.

Q. And where was he seen on that day? (456) A. At approximately nine-fifteen, Mr. O'Hara proceeded to a restaurant on West 49th Street.

Excerpts from Testimony of Mr. Esposito

Mr. Schwartz: Is that a.m. or p.m.?
The Witness: a.m.

Q. Did you observe Mr. O'Hara's walk on that day? A. Yes; I did.

Q. Would you describe it for us? A. He walked in a normal manner.

Q. When did you next go to Mr. O'Hara's residence? A. On November 24, 1971.

Q. Did you see Mr. O'Hara on that date? A. Yes; I did.

Q. Would you tell the Court and the jury what you observed about Mr. O'Hara's activities on that date? A. Yes. At 10:45 Mr. O'Hara was observed leaving his house. He walked to the National Maritime Union Building at 346 West 17th Street.

Mr. Schwartz: Can we have a date?
The Court: What date was that?
The Witness: November 24, 1971.

Q. Did you walk along with Mr. O'Hara? A. Yes; I did.

Q. What did he do on arrival at NMU? A. He entered the building.

(457) Q. Did you observe him any more on that date? A. Yes.

Q. When did you next see him? A. At 1:45 p.m., in the afternoon.

Q. And what did you observe then? A. He walked home at this time, stopping in two stores for small purchases.

Q. Would you describe for us Mr. O'Hara's walk, as you observed him on November 24, 1971? A. Yes. In the a.m., when Mr. O'Hara walked to the union hall, it

was at a fast pace, and this is located approximately thirty blocks from his home. I have a physical disability, and I wasn't able to walk the whole length with him. I walked about half way, and this other investigator walked the rest of the way with him. This was at a fast pace.

Mr. Schwartz: Just a moment, now. I object to him talking about anybody other than himself.

The Court: Yes.

(To the witness) How far did you walk following him?

The Witness: About half the distance; about fifteen blocks, approximately.

The Court: And then you stopped; you dropped out?

The Witness: Correct. That's right.

(458) The Court: And someone else continued on?

The Witness: That's right.

The Court: And you didn't see him after you dropped out?

The Witness: Yes; I did. I followed in a car.

The Court: You followed in an automobile and kept him under constant observation?

The Witness: Not every second. He was blocked sometimes by trucks and cars, but most of the time he was in my sight until the hall—until the union hall.

• • •

Excerpt from Opening Statement of Mr. Schwartz

(16)

The plaintiff, Michael O'Hara, was a man forty-five years of age, who was a wine steward, and on the day of this occurrence, which was May 21, 1969, he was working on a steamship known as the Brasil, which went between various ports, Puerto Rico and so forth and New York, and on the way back, while he was proceeding from what they call the galley to the main dining room upstairs, there is an escalator. There is an Up escalator and a Down escalator.

He had at that time a rack of glasses which he was taking up to the main dining room. This was around noon time. He went on to the escalator, and, as was his practice, he rested part of this rack of glasses on his right knee and held on to the bannister with his left hand.

• • •

Defendant's Exhibit J-1

Photograph of Escalator

(Opposite) ☛

Services of three (3) copies of
the within Brief & Appendix is
hereby admitted this 30th day
of January, 197-

Rasner & Rasner

Attorney for

Mike O'Hara